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No. 84-1284

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Petitioner,

vs.

GEORGE SQUILLACOTE, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the court of appeals properly refused to vacate its decision and transfer the appeal to the Federal Circuit after the case had been fully argued and decided by the court of appeals and where the court found that allowing transfer would defeat the purpose of the statute designating the appropriate appellate tribunal, 28 U.S.C. § 1295(a)(2).

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RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

That this case does not warrant the issuance of a writ of certiorari is apparent from a review of the carefully considered opinions issued by the court below (App. 1a and 20a).[1] After a unanimous decision on the merits, generally adverse to its interests, the government raised for the first time, on rehearing, a claim that the court of appeals lacked jurisdiction, arguing that the case should now

[1] "App. ____" refers to the government's Appendix to its Petition for a Writ of Certiorari.

be transferred to the Court of Appeals for the Federal Circuit for a hearing *de novo* before a different panel of circuit judges.

While the Petition is framed in the usual terms suggesting special significance, e.g., the decision below "threatens to undermine a long line of precedent" (Pet., p. 15) and "represents a significant interpretation of the Federal Courts Improvement Act" ["FCIA" or "the Act"] (Pet., p. 13), these claims of importance are not persuasive when one considers the limited parameters of the appeals court's opinion and the full circumstances of the issues presented (App. 4a).

1. This case was brought on behalf of a class of federal employees, all of whom are members of the Senior Executive Service ("SES"), seeking to recover wrongfully withheld back pay. Plaintiffs' ["Respondents"] claims raised no constitutional questions or novel issues of statutory construction. The court of appeals described the case as "another in the series of cases challenging Congressional efforts . . . [to limit] . . . salary increases authorized for federal employees. See, *e.g.*, *United States v. Will*, 449 U.S. 200 (1980); *Foley v. Carter*, 526 F.Supp. 977 (D.D.C. 1981)" (App. 20a-21a). Each of the appropriations measures at issue [Pub. L. 95-391, Pub. L. 96-86, Pub. L. 96-369, Pub. L. 96-536 and Pub. L. 97-12] has since lapsed and, significantly, the government has not asked this Court to review the decision on the merits. It seeks only to resolve a claimed jurisdictional issue, raised for the first time in a petition for rehearing, and if successful, to obtain a second chance to present its arguments to a different panel of circuit judges.

2. The court of appeals' jurisdictional ruling does not, as the government suggests, establish a "dangerous and

troublesome precedent" (Pet., p. 13), and is not a "significant interpretation of the Federal Courts Improvement Act" (Pet., p. 13). First, as the government concedes in its Petition (p. 11), the court of appeals interpreted Section 1295 consistent with the government's position, i.e. by concluding that if the question had been timely raised, the case would have been transferred to the Federal Circuit. Moreover, the case is of minimal precedential value since the possibility that future "little Tucker Act" cases will be considered by regional courts of appeals is unlikely, given the fact that the government is a party to all Tucker Act cases. Presumably, government attorneys hereafter will timely (before suffering an adverse decision on the merits) move to transfer to the Federal Circuit any such appeal docketed in a regional circuit court of appeals. Additionally, the court of appeals itself minimized the precedential value of its decision, strictly limiting its application to circumstances where "a case has been fully argued and decided . . . [and where] allowing transfer would defeat the purpose" of the statute designating the appropriate appellate tribunal (App. 6a).

STATEMENT OF THE CASE

In an initial opinion not at issue here, the court of appeals rejected respondents' argument that the Civil Service Reform Act superseded, as to SES employees, the earlier-enacted fiscal year 1979 pay limitation imposed under Section 304(a) of Pub. L. 95-391 (App. 34a). It found, however, that respondents' pay had been improperly limited during fiscal years 1980 and 1981, concluding that the

1980 limitation (Section 101(c) of Pub. L. 96-86) which was relied upon by the government to limit respondents' pay, was not applicable to members of the SES (App. 43a).

After the court issued its decision on the merits, the government argued for the first time that the Federal Circuit had exclusive jurisdiction of the appeal and that the case should be transferred to that court for a hearing *de novo*.

In refusing to vacate its decision, the court of appeals first considered whether the transfer would have been granted if it had been timely requested (App. 2a-4a). The court concluded, as the government contends, that the appeal should have been taken to the Federal Circuit (App. 4a). The court of appeals then carefully reviewed the legislative history of the FCIA and determined that the purposes of the Act would be wholly frustrated by allowing the government's "belated request" that its decision be vacated and the case transferred (App. 4a-6a). The Seventh Circuit noted that the legislative history of the FCIA addresses primarily the need for centralized review of patent appeals and that a secondary purpose of the Act was to "improve[ ] the administration of the system by reducing the number of decision-making entities within the federal appellate system" (App. 5a, *quoting*, S. Rep. 275, 97th Cong. 2d Sess. 3, *reprinted in* 1982 U.S. Code Cong. & Ad. News 11, 13). Because no patent issues are presented by this case, the court of appeals found that "the only statutory purpose that might be affected is the one of efficiency in the appeals process," and concluded that "acceding to the government's request would sabotage the goals of the legislation" (App. 5a). The court further noted that granting the government's request would "condone

the very forum-shopping repudiated by Congress in enacting the FCIA" (App. 6a).[2]

In rejecting the government's argument that a "jurisdictional" challenge may be made at any time, even after a decision on the merits, the court of appeals noted that 28 U.S.C. § 1295 does not implicate the power of the federal judiciary to consider the issues presented. Here "the question is not one of the federal courts' power to hear the case" (App. 9a).

The court then discussed a number of cases which demonstrate "a more flexible approach to subject matter jurisdiction when federal-state relations are not at stake" (App. 9a-12a). The court also found that basic fairness favored denial of the government's belated request that it vacate its decision and transfer this case (App. 14a), and that, under the circumstances of this case, transfer would not be "in the interest of justice" (28 U.S.C. § 1631) (App. 17a). Instead, to vacate the court's judgment on appeal and transfer the case to another court "would give the government a second bite at the apple and only result in needless expense and waste for the plaintiffs, the judges of the Federal Circuit, and ourselves" (App. 17a).

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[2] As was stated by the Senate Report, the FCIA "is not intended to create forum shopping opportunities between the Federal Circuit and the regional courts of appeals . . ." (App. 6a, *quoting*, S. Rep. 275, *supra*, at 19-20, *reprinted in* 1982 U.S. Code Cong. & Ad. News 11, 29-30).

REASONS FOR DENYING THE WRIT

In its Petition, the government argues that principles of fairness, the interest of justice and legislative intent are not germane in resolving the question of whether 28 U.S.C. § 1295 requires the Seventh Circuit to vacate its carefully considered decision on the merits and transfer the case to the Federal Circuit. Insisting that the word "jurisdiction" warrants, in every instance, an inflexible adherence to the rules against waiver and estoppel, the government contends that even questions which "implicate not federalism but Congress's policies regarding the orderly division of business between the federal courts" (Pet., pp. 18-19) must be resolved in absolute terms.

1. The government's characterization of the Seventh Circuit's ruling on the jurisdiction issue is overbroad and inaccurate. It writes: "[T]he Seventh Circuit's holding that objections to subject matter jurisdiction may be waived and that, depending on the equities, a court may 'ignore the otherwise clear dictates of a [jurisdictional] statute' . . . will stand as a dangerous and troublesome precedent . . ." (Pet., p. 13). This characterization exaggerates the scope of the Seventh Circuit's opinion and fails to recognize that court's own carefully delineated limitation on its holding. As the court stated:

> [T]his is a rare exception to the jurisdictional scheme, which is dictated by the purposes underlying the FCIA. The unusual posture of this case guarantees that our decision is a very limited one. Only after a case has been fully argued and decided in a situation in which both the statutory meaning is ambiguous and allowing transfer would defeat the purpose of that statute would our decision be permissible (App. 6a).

The government's purported fear that this case will stand for the principle that subject matter jurisdiction can be waived is unfounded. The Seventh Circuit's refusal to vacate its judgment and transfer this case to the Federal Circuit was based on the very unusual circumstances presented by this case; its holding does not stand for the broad proposition that principles regarding subject matter jurisdiction are to be ignored whenever a court concludes that equity would dictate such a result (Pet., p. 13).

Respondents do not dispute that the federal courts are courts of limited jurisdiction and that true subject matter jurisdiction involves the court's *power* to hear a case. But as the Seventh Circuit noted (quoting Professor Wright[3]) the rule that a case should be dismissed on jurisdictional grounds after a decision on the merits is a "harsh rule" which can hardly be defended as a sensible regulation of procedure, and can only be justified by "the delicate problems of federal-state relations that are involved" (App. 8a). The court of appeals recognized that the "jurisdictional" question here does not present an issue affecting the division of judicial power between federal and state courts (App. 9a). No one disputes that this case belongs in the federal court system and that Section 1295, much like statutes and rules pertaining to venue, concerns only the division of judicial responsibilities among circuit courts of equal stature—not the existence of judicial power.

The Seventh Circuit concluded that when, as here, "the crucial factor—federal-state relations—is absent" a court

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[3] (App. 7a-8a). C. Wright, The Law of Federal Courts 23 (4th ed. 1983). See also, Hart and Wechsler, The Federal Courts and the Federal System 837-839 (2d ed. 1973); American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 64-65, 370-74 (1969).

may take a "more flexible approach to subject-matter jurisdiction" (App. 9a). This "more flexible approach" necessitates consideration of both the congressional intent underlying the statute as well as notions of fairness and justice.

2. The Seventh Circuit discussed numerous cases in concluding that the intent of Congress in enacting the Federal Courts Improvement Act was relevant in deciding whether the case should be transferred to the Federal Circuit. See that court's discussion of *Estate of Watson v. Blumenthal*, 586 F.2d 925 (2d Cir. 1978), *Municipal Intervenors Group v. Federal Power Comm.*, 473 F.2d 84 (D.C. Cir. 1972), *Transcontinental Gas Pipe Line Corp. v. Federal Energy Regulatory Comm.*, 659 F.2d 1228 (D.C. Cir. 1981), and *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970) (App. 9a-13a). These cases do not reflect the government's rigid view of the nature of subject matter jurisdiction. Instead, the court in each of these cases examined legislative intent in resolving the issue of subject matter jurisdiction. The willingness of these courts to analyze congressional intent "acknowledge[s] implicitly that jurisdictional concerns when statutory competence alone is challenged lack the urgency and the special character of such claims when the scope of Article III power is being decided" (App. 14a). Such an examination is appropriate because the power of the federal judiciary to hear this case is not in question.[4]

[4] It should also be pointed out that, in marked contrast to the case at bar, the jurisdictional issue in each of these cases was timely raised and there was thus no concern, as there is here, that the losing party would get "two bites of the same apple" (App. 17a) or that the resources of the federal courts would be wasted

(Footnote continued on following page)

The government's reliance on *Flanagan v. United States*, ____ U.S. ____, 104 S. Ct. 1051 (1984), in support of its absolute and inflexible jurisdictional argument is misplaced. Indeed, *Flanagan* supports the result reached by the Seventh Circuit. The issue in *Flanagan* was whether the district court's order granting a party's motion to disqualify a law firm from multiple representation was a final and appealable order pursuant to 28 U.S.C. § 1291. In *Flanagan*, this Court gave careful consideration to the policies underlying Section 1291 to determine whether the district court should continue to hear the case prior to an appeal of that issue. This Court's analysis of the policies underlying Section 1291, including the promotion of the efficient administration of justice, is precisely the flexible approach used by the Seventh Circuit in the instant case.

The legislative history of the FCIA reveals that the primary purpose in enacting the statute was to develop a single forum for patent appeals.[5] A secondary purpose was to improve the administration of justice within the federal appellate system. S. Rep. No. 275, 97th Cong., 2d Sess. 3, *reprinted in* 1982 U.S. Code Cong. & Ad. News 11, 13. As the Seventh Circuit noted:

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[4] *continued*
by having a second court consider the merits of an appeal which had been fully adjudicated by another court of equal stature in the federal system.

[5] Prior to the enactment of Section 1295, the District Courts and the Court of Claims had concurrent jurisdiction over patent cases. The losing litigant had the right to appeal to the regional court of appeals, the Court of Customs and Patent Appeals and, in certain circumstances, the United States Court of Claims. The variety of forums led to inconsistent decisions in the area of patent law. That in turn led to forum shopping. H.R. Rep. No. 312, 97th Cong., 1st Sess. 20-21 (1981).

> [T]he only statutory purpose that might be affected is the one of efficiency in the appeals process. That being so, insuring that our decision fulfills this intent gains in importance. Our acceding to the government's request would sabotage the goals of the legislation. It would require the parties to reenact the process already fully complied with in our courtroom, thereby imposing additional and unnecessary delays and expense on both parties and on our judicial resources (App. 5a).

Clearly, to require that the Seventh Circuit's judgment be vacated and that the case be transferred to the Federal Circuit would be contrary to the intent of Congress in enacting the FCIA.[6]

3. The use of the word "jurisdiction" in Section 1295 is appropriate in the sense that this statute describes the kinds of cases to be reviewed by the Federal Circuit. However, it is not an apt term in the context of whether the statute is a general limitation upon the power of federal courts. To permit waiver in this case does not result in the exercise of judicial power which otherwise has been withheld from the federal judiciary by the Constitution or Congress.

Nor is the use of the term "jurisdiction" in Section 1295 controlling, at least in terms of whether rules of waiver and estoppel are applicable. This Court has been careful not to read the word "jurisdiction" in a vacuum. In fact, in *Panama R. Co. v. Johnson*, 264 U.S. 375 (1924), and *Pure Oil Co. v. Suarez*, 384 U.S. 202 (1966), the Court

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[6] The transparency of the government's argument is further demonstrated by the fact that had the case been transferred to the Federal Circuit, the Chief Justice could have designated and assigned the members of the original panel in this case to the Federal Circuit to hear the case a second time (28 U.S.C. § 291).

interpreted a provision of Section 24 of the Judicial Code as a venue provision, although it used the word "jurisdiction." The statute provided: "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." The *Panama* Court held that "the provision is not intended to affect the general jurisdiction of the District Courts as defined in Section 24, but only to prescribe the venue for actions brought under the new act. . . . Its use of the word 'jurisdiction' seems inapt, and therefore not of special significance." *Panama, supra* at 385. See also, *Stewart v. United States*, 199 F.2d 517, 519 (7th Cir. 1952) ("[t]he word 'jurisdiction' is an illusive and uncertain characterization, depending upon the environment in which it is employed"), *Champion Spark Plug Co. v. Champion Ignition Co.*, 247 F. 200 (E.D. Mich. 1917) (use of word "jurisdiction" in Judicial Code not jurisdictional in strict sense), and *Interior Construction & Improvement Co. v. Gibney*, 160 U.S. 217 (1895) (defendant may waive "jurisdiction" at his election).[7] Thus the use of the word jurisdiction in a given statute or rule must be viewed in light of the purposes of the statute or rule sought to be applied.

4. It would be fundamentally unfair to grant the government's request to vacate the Seventh Circuit's decision and to transfer the case at this late date. The

[7] See also, *DiFrischia v. New York Cent. R.R.*, 279 F.2d 141 (3d Cir. 1960) and *Klee v. Pittsburgh & W. Va. Ry.*, 22 F.R.D. 252 (W.D. Pa. 1958), both finding subject matter jurisdiction is subject to waiver in certain circumstances; *Vecchione v. Wohlgemuth*, 426 F. Supp. 1297 (E.D. Pa. 1977) (commenting on "the inequities which may stem from a blind adherence to the mistaken notion that an attack upon subject matter jurisdiction is forever available in all circumstances").

Seventh Circuit appropriately applied principles analogous to estoppel in refusing to do so (App. 14a-16a). While the government cites cases in support of its contention that estoppel is not generally applicable to issues of subject matter jurisdiction (Pet., p. 20), it should again be emphasized that this case does not present an issue involving pure subject matter jurisdiction, and the Seventh Circuit opinion does not attempt to alter longstanding jurisdiction principles which disfavor the employment of estoppel and waiver considerations where the existence of judicial power is involved. The Seventh Circuit held only that where a statute directs that appeals be taken to one of several federal courts of equal stature, where the crucial relations between federal and state power are not at stake, where the statute itself is ambiguous, *and* where denying jurisdiction at a late date would clearly undermine the congressional intent behind the statute, notions of fairness and estoppel become relevant.[8]

It is clear that in this situation the government's conduct was indefensible and threatened to cause serious delay in providing justice to the federal employee-members of the plaintiff class.[9] The government, as noted

[8] In discussing the question of "fairness," the government states that by moving for a hearing *de novo* it is "giving up a favorable judgment . . . with respect to fiscal year 1979" (Pet., p. 21), implying that the court should also have considered this fact in its examination of "fairness." The claims for fiscal 1979, however, involve less than eight weeks of back pay, or approximately 7% of respondents' claims; thus, the comparison is not a valid one.

[9] Respondents dispute the government's claim to a strong case on the merits for fiscal 1980 (Pet., p. 23), should it obtain a "second bite at the apple." The fiscal 1980 cap, by its terms, applied only to employees "who under existing law are entitled to approximately 12.9 percent increase in pay." The government contends that 82 percent of all SES members would have received an

(Footnote continued on following page)

by the Seventh Circuit, "deals with Section 1295 on a daily basis" (App. 15a) and is charged with knowledge of the workings of that statute. This point is further emphasized by the fact that the government has invoked Section 1631 in earlier cases to transfer cases involving Sections 1295 and 1346(a)(2) to the Federal Circuit, *e.g.*, *Oliveira v. United States*, 734 F.2d 760 (11th Cir. 1984), *Corwin v. Lehman*, 724 F.2d 1577 (Fed. Cir. 1984), *Spagnola v. Stockman*, 732 F.2d 908 (Fed. Cir. 1984), *Heisig v. United States*, 719 F.2d 1153 (Fed. Cir. 1983), and therefore had actual knowledge of the statute.[10]

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[9] *continued*
"11.3% raise" and that the fiscal 1980 pay cap therefore arguably applied to the SES (Pet., p. 24). The government's claim is both incorrect and misleading. First, as the Seventh Circuit found:

> Comparing 1980 scheduled rates, without regard to the Section 5382(b) cap, with 1979 payable rates results in increases close to 7 percent for SES levels 1 through 3 and increases of approximately 11.3, 15 and 19 percent for levels 4, 5, and 6 respectively (App. 39a).

Furthermore, as Petitioner well knows, the "approximately 12.9% increase" comes from a very specific and precise source—a source which has no application to members of the SES. As this Court previously explained (*United States v. Will*, 449 U.S. 200, 222 and n.5), the 12.9% increase for fiscal 1980 was computed by compounding the fiscal 1979 increase of 5.5% payable to other federal employees under the Federal Pay Comparability Act of 1970, 5 U.S.C. §§5305 *et seq.*, and the 7% increase payable under that statute to such employees for fiscal 1980. These increases, when compounded, total exactly 12.9%. The 5.5% and 7% increases payable under the Comparability Act were not applicable to SES employees who are not covered by that statute. The SES increases (of 7% to 19%) were payable under the Civil Service Reform Act, 5 U.S.C. § 5382.

[10] The Seventh Circuit also observed that while it agreed generally with the government's interpretation of Section 1295, respondents "cannot be charged with neglect" because their contrary interpretation of the statute was "understandable" (App. 15a). In response to the petition for rehearing, respondents argued that

(Footnote continued on following page)

The court also considered the principle of fairness when it considered whether the requested vacation of its decision and transfer met the statutory requirement that a proposed transfer be "in the interest of justice." 28 U.S.C. § 1631. The Seventh Circuit concluded that to vacate its decision and transfer the case to the Federal Circuit, under the limited circumstances of this case (after argument and decision on the merits), would not be "in the interest of justice" (App. 17a). The court also noted in this regard that "refusing to transfer at this late date is not without precedent" (App. 18a, citing *Milburn v.*

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[10] *continued*
the Seventh Circuit had jurisdiction. Section 1295 gives the Federal Circuit jurisdiction over appeals from cases based on 28 U.S.C. § 1346 *except* when "*the claim is founded upon an Act of Congress* or a regulation of an executive department providing for internal revenue." (Emphasis supplied.) Respondents' claims are each founded on "an Act of Congress." The Seventh Circuit's conclusion that this exception applies only to Acts of Congress providing for internal revenue is not supported by the legislative history of the FCIA or by basic principles of statutory construction. "An Act of Congress" is a separate phrase without any qualifying language. Qualifying phrases apply to the words or phrases immediately preceding and are not to be construed as extending to others more remote. *Azure v. Morton*, 514 F.2d 897, 900 (9th Cir. 1975); *Quindlen v. Prudential Ins. Co.*, 482 F.2d 876, 878 (5th Cir. 1973); 2A Sands, Sutherland Statutory Construction, § 47.33 at 159 (1973 ed.). Thus, the phrase "providing for internal revenue" applies only to the immediately preceding phrase—"a regulation of an executive department"—and not to the more remote phrase, "an Act of Congress." Additionally, the use of a disjunctive in a statute indicates alternatives and requires that those alternatives be treated separately. *Azure*, *supra* at 900; *Quindlen*, *supra* at 878. Accordingly, the two phrases, "an Act of Congress" and "a regulation of an executive department providing for internal revenue" must be read as alternatives. *See also*, S. Rep. No. 275, 97th Cong. 2d Sess. 20, *reprinted in* 1982 U.S. Code Cong. & Ad. News 30 ("when the claim is founded on an act of Congress or a regulation for internal revenue . . . [it] will continue to go to the regional courts of appeals.").

United States, 734 F.2d 762 (11th Cir. 1984)).[11] *See also*, *Baker v. United States*, 722 F.2d 517 (9th Cir. 1983) and *Coleman v. United States Bureau of Indian Affairs*, 715 F.2d 1156 (7th Cir. 1983), and other Tucker Act cases decided by the regional courts of appeals since the creation of the Federal Circuit. If the government's theory is correct, the decisions in all of these cases are void.

CONCLUSION

For the reasons stated herein, respondents respectfully submit the Petition for Certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

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[11] *Milburn*, a case in which jurisdiction was based on Section 1346 (a)(2), was decided by the same panel of the Eleventh Circuit on the same date as *Oliveira v. United States*, *supra*, a case in which the circuit court decided it was in the interest of justice to transfer to the Federal Circuit. Significantly, the *Milburn* opinion was authored by Judge Howard Markey, Chief Judge of the Federal Circuit, sitting by designation. As the Seventh Circuit aptly notes:

> that the panel would transfer one case and decide the other the same day without noticing the jurisdictional problem at all seems incredible. That they did hear *Milburn* and decide it on the merits suggests that 28 U.S.C. § 1295 both lacks the absolute quality the government would give it and lacks the import of statutes regulating federal-state relations (App. 18a).